



The Covid- 19 Job Retention Scheme

1. The Government has announced the details of the support it is providing for employees in the light of the Coronavirus. The scheme is unprecedented but unsurprisingly generates a number of anomalies and questions
2. Basically, employers who agree to “furlough” employees can claim from HMRC and pay to those employees 80% of their (gross) salary or £2,500 whichever is the lower. Employees must have been in post on 28th February.
3. It is open to employers to top up their payments, but they will have to be able to show that such decisions are not in breach of the equal pay law and that they are not based on protected characteristics.
4. Similarly, employers may be tempted to use the crisis to make redundant staff regarded as undesirable. Given the furlough scheme however an ET might be reluctant to accept that redundancy was the real reason for such a dismissal. Decisions about who to furlough and who to dismiss may come under scrutiny under the Equality Act 2010.
5. Tips Commission and bonuses are not included in the pay calculation which like other features of the scheme (see below) may operate harshly on the lower paid such as Bar staff who often depend on tips
6. Employees must be completely furloughed i.e. do no work for their employer which creates huge difficulties for employers with enough work for short time working but no more. Suppose Peter’s normal monthly salary was £4,500 but his employer offers him part-time working at £1,500 pcm. It would obviously be in the interests of the business for Peter to do the work

but difficult to see why he shouldn't receive the same subsidy he would have received had he been completely furloughed

7. Another question is what is meant by an employee. We are told that zero hours contract workers are covered amounting to an unprecedented recognition of the dependency relationship between such individual and those who use their services. Agency workers are also covered though it will be the agency which makes the claim.
8. What is less clear is the position of a long-term consultant. Such person would probably not be an employee in the sense of someone who works under a contract of employment but would be limb B employee for the purpose of 230 (3) (b) ERA. Even if S/he might otherwise be covered, the imposition of a service company will prevent the necessary contract arising and that individual will need to claim via the government's parallel scheme for the self-employed.
9. Though those made redundant since February can still qualify if they are rehired, but it is no clear whether their continuity of employment will be restored as a consequence. Nor is it clear whether if not rehired those dismissed in a hurry after 28th February would have a claim for unfair dismissal. One would have thought that a redundancy dismissal would be easy to establish but in these extraordinary times there might for example be a different result if the dismissed employee were to appeal the dismissal out of time and after the introduction of the scheme. A prudent employer might well rehire.

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